benefits for top managers outside of compensation such as efficiency incentives and the capital debt reduction allowance. Additionally, top managers who are also owners enjoy all other benefits of ownership such as tax advantages, ability to use accumulated equity as collateral for other businesses, and interest income from the deposit of revenues. Therefore, the compensation paid to top managers is strictly limited to compensation for necessary top management services which are actually performed by the top manager for a facility.

In compliance with the legislative mandate to contain costs (Minnesota Statutes, section 256B.501, subdivision 3), it is necessary to limit the total compensation reimbursed to top management.

Reasonableness:

Item A. The department believes that five hours per week in a facility with six beds is the minimum reasonable amount of top management time necessary to administer such a facility. Given the standard of five hours per six beds per week, a facility or provider group with 48 beds would require 40 hours (full-time) top management services.

Item B. The maximum amount that can be earned for providing full-time top management services for one facility with 48 or more beds is $40,656. This figure represents the limit established under the temporary rule, 12 MCAR §§2.05301 to 2.05315, as adjusted by the Consumer Price Index (CPI) since 1984. No additional compensation is allowed for each licensed bed over 48 in a single facility since there is an economy of size at work in large facilities so that each additional resident does not require additional top management time.

A facility or group of facilities with a total bed complement of 48 or fewer beds may earn a maximum amount annually for the management services of $847 times the number of licensed beds. This computation assumes that few economies of scale can occur until the total bed complement exceeds 48 beds.

When a provider or provider group has more than one facility with a total complement of more than 48 beds, the task of administration may become so large as to require hiring additional people to perform specific top management functions. In this case, the maximum top management compensation allowed is $40,656 plus an additional $348 per licensed bed for each bed over 48 beds. Therefore, the proposed rule recognizes the need for more top management services when more that 48 beds are operated in different locations, but the amount per bed is reduced in recognition of the fact that economies of scale are possible. These limits are the same as those used in temporary rule 53 (12 MCAR §§ 2.05301 to 2.05315) as indexed by the CPI.

Item C. The maximum amount of total compensation that can be reimbursed through these rule parts to an individual who performs top management services is $53,820. This figure was chosen because it represents a mid-range salary in the salary scale of the assistant commissioners of the Department of Human Services. The assistant commissioner responsible for the administration of all state operated ICFs/MR, nursing homes, and programs for the mentally ill and chemically dependent in state institutions is compensated under this schedule. It is reasonable that an individual involved in top management of less number of beds should not be paid a greater amount by the state than what is paid to the person with responsibility for a larger system and who also has additional responsibilities

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for overall state policy regarding the services provided to mentally retarded, mentally ill, and chemically dependent citizens.

Item D provides that a person cannot circumvent the top management limit by charging part of this compensation as consulting fees.

Item E establishes that benefits are not included in the limit so that the limit is not unnecessarily restrictive.

Item F establishes that those top management fringe benefits which are not provided to all or substantially all employees at the same benefit level, will be disallowed. This provision avoids circumvention of the limit by providing additional fringe benefits to top management to augment their salary.

Item G provides that top managers working less than full-time can be compensated for other necessary services. In small facilities, program director, dietary, and top management functions may be provided by the same person. This item recognizes the legitimacy of such situations.

Item H provides that the top management limits will be adjusted as indicated by the all urban consumer price index (CPI-U). The CPI-U is a commonly accepted index of changed costs which has been traditionally used in department reimbursement rules.

Part 9553.0035 Subpart 15. General Cost Principles.

Statement of Need:

Subpart 15 lists criteria to evaluate cost reports and determine allowable cost. The general cost principles supplement the specific requirements found in the proposed rule and apply to all costs. The criteria are based upon Minnesota Statutes, section 256B.501, subdivision 2 requiring that payment be related to resident care and be performed by efficiently and economically operated facilities. The criteria are supported by the nature of the state's relationship to the federal government as a recipient and administrator of federal funds and the Department's responsibility to effectively use public funds. Under 42 CFR 447.253, the state is required to make assurances to the federal government that payment criteria are consistent with efficiency, economy, and quality of care. Such criteria are stated in the rule in order that those subject to the rule are reasonably able to determine what conduct is appropriate.

Reasonableness:

Item A. It is reasonable to state the requirement that costs be ordinary since the absence of such criteria could result in the allowance of costs that are unreasonable. If we do not require that costs are necessary, then the state may pay for what is unnecessary. If we do not require that costs are related to resident care, then we sacrifice the integrity of the program which is expressly established for that purpose. 42 CFR, section 405.451 establishes the same standards as item A when it uses the terms, "necessary and proper costs."

Item B. If we do not hold the providers to the standard of "a prudent and cost conscious business person" operating in the open market, then we run the risk of wasting public funds.

Item C. If we do not require that goods paid for be "actually provided," then the state may pay for something which is not provided.

Item D. If we do not adhere to the standard that substance prevails over form, we may allow the possible distortion of facts and figures to overwhelm the letter of the law. In addressing the need for and reasonableness of a similar provision in Rule 50, Judge Lunde commented on this provision that a similar rule was applied in Koronis Manor Nursing Home v. Department of Welfare, 311 Minn. 375, 249 N.W. 2D 448 (1978). The issues in that case establish a continuing need for this item. (Lunde Report, 1985: p. 35.)

And, finally, if we were to compensate inefficiencies we would violate federal and state statutes (Minnesota Statutes, section 256B.501, subdivision 2) and do a disservice to the public.

Since the absence of such criteria would be unreasonable, their presence is reasonable and necessary to effectively administer the Medical Assistance Program.

VI. NONALLOWABLE COSTS - Part 9553.0036

Statement of Need:

Minnesota Statutes, Section 256B.501, Subdivision 2, requires that rules established for the determination of rates shall specify costs that are allowable. The listing of allowable costs item by item would be arduous, time consuming, and in all probability, not all-inclusive. Further, providers of facilities would be hindered in their ability to judge the nonallowability of costs. Prudent business decision making requires ease and prior knowledge of differentiations between expenses that will be paid in the market place and costs that will result in a loss of revenue.

Reasonableness:

The Legislature's requirement that rules shall specify allowable costs indicates the Legislature did not intend to authorize the allowability of all costs. Thus, it is necessary and more understandable to providers and payors if nonallowable costs are designated.

The fact that particular items have been deemed nonallowable does not prohibit their use or application and does not connotate a value judgment. It only serves to provide notice to providers that such an item is not payable under the Minnesota Medical Assistance Program. Facilities are free to use or acquire nonallowable items but the department will not pay public funds towards their purchase.

In general, the reporting of nonallowable costs on the cost report form is required in order to enable the department to identify disallowed costs and associated costs efficiently. Some disallowed costs are disallowed because they are not directly related to resident care. Therefore, it is not appropriate for either private residents or for medicaid residents to pay them. An example of such disallowed costs is the cost of gifts to employees and memberships in athletic clubs for owners, employees, and directors. Other disallowed costs are not allowed because they are billed directly to the payor on a separate fee schedule.

Item A disallows contributions, including charitable and political contributions, in order to maintain the standard that costs be related to resident care. Also, Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under the Medical Assistance Program.

Item B disallows lobbyist salaries and expenses. It is reasonable to do this because such costs are not related to resident care. Also, Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under medical assistance.

Item C disallows association dues for political contributions, lobbying and unsuccessful litigation over challenges to decisions by state agencies. This is reasonable because such costs are not related to resident care and because such costs are disallowed at the facility specific level. Allowing these costs at an association level would result in a circumvention of the rules by injecting a third party into the transaction. This provision is based upon the principle that a facility cannot do indirectly what it may not do directly. When a breakdown of dues is requested and not provided, the entire cost is disallowed so that an incentive is created to correctly report and to simplify administration of the program. Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under the Medical Assistance Program.

Item D disallows advertising for potential residents, but specifically allows for a total expenditure of $2000 for all notices in the telephone yellow pages, for the purpose of stating general information about the facility and available services. This is reasonable because the disallowed types of advertising are not related to resident care and information concerning a facility may be given to prospective residents when contacted via the yellow pages. Also, Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under medical assistance.

Item E disallows assessments levied for uncorrected violations. It would be contrary to public policy to pay for the violation of the law and this item is reasonably intended to disallow such payments. To do otherwise would diminish incentives to stay in compliance with facility and program standards. Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under medical assistance.

Item F holds that gifts provided to employees/owners, employee parties, and business meals are not allowable. It is reasonable to disallow such items because they are not related to resident care. The rule, however, does allow for staff development costs, cash bonuses and the cost of meals incurred as a result of required overnight business travel.

Item G is reasonable in order to maintain the legislatively prescribed standard that costs be incurred in efficiently and economically operated facilities (Minnesota Statutes, Section 256B.501). Also, these costs are not related to resident care. A business which is assessed a penalty or charge resulting from inefficient or uneconomical management or violations of standards should not be spared the burden of such error or negligence.

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Item H which disallows the purchase of pets and maintenance cost of pets in excess of $20 per licensed bed per year is a reasonable way of preserving the integrity of a public assistance program designed for human health care. Minnesota Statutes, section 144.573, allows facilities to keep pets on the premises subject to reasonable rules. Thus, the Department does not prohibit pets but merely holds that the purchase and maintenance costs in excess of the limit should not be subsidized by the Medical Assistance Program. Twenty dollars per year per licensed bed was set so that even a six bed facility would have $120 for pet care. However a $200 limit is set in the interest of cost containment. It should also be noted that pets may be provides at very low cost to the facility by organizations such as the Humane Society and that the facility may use donations for these purposes. Additionally, pets owned by individual residents are the financial responsibility of these residents.

Item I which lists costs of sponsoring nonresident activities such as athletic teams or beauty contests is necessary and reasonable to prevent the expenditure of public dollars on activities unrelated to resident care.

Item J disallows premiums on life insurance policies for owners, board members, and related organization employees unless certain conditions are present. It is reasonable to place these conditions because of the potential abuse which would result if owners or board members were allowed special treatment and the ability to acquire compensation in excess of that to which one is entitled for services rendered. The standard of reasonableness is based upon a comparison to the policies available to all other employees. Thus, it is necessary and reasonable to recognize an exception to the disallowance when the insurance coverage has no potential for providing excessive compensation to specific individuals as in a group policy and the insured person is an employee of the provider or related organization. A second exception is necessary to allow the premium cost when a party external to the facility requires such insurance as a condition of the mortgage or loan for the facility or provider group.

Item K disallows personal expenses of owners and employees. It would not be reasonable to allow personal expenses of owners and employees to be charged to public funds. Owners and employees are compensated for services provided to the facility and therefore, such expenses should be paid out of an individual's earnings.

Item L disallows employee and owner membership fees in organizations that are not related to the individual's profession or job function. It would not be reasonable to allow expenses that are not related to resident care to be charged to medical assistance. Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under medical assistance.

Items M and N disallow the payment of training expenses when it is not related to the care of the residents. It is reasonable to disallow payment of such costs to prevent the facility from using public funds for purposes other than resident care. Training which leads to a new profession is not related directly to the care of residents and is, therefore, reasonably disallowed. The disallowance of such training costs is comparable to the treatment of such costs for deductibility purposes under the Internal Revenue Code.

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Item O disallows the cost of bad debts. The Medical Assistance Program does not create bad debts and therefore, bad debts have no relationship to the operation of the Medical Assistance Program. Since over 99 percent of the revenues in the ICF/MR industry come from Medical Assistance, it is reasonable to disallow the costs of bad debts.

Item P disallows costs of fund raising activities. A facility which generates revenues through fund raising should appropriately assess the costs associated with that fund raising against the proceeds generated by the activity and not public funds. The proposed rule parts encourage fund raising by not offsetting any of the proceeds of fund raising against the costs of the facility.

Item Q disallows personal need items when they are normally paid for by residents. This is a reasonable method to insure that personal items such as clothing which are the responsibility of the resident are paid by the resident out of the personal needs allowance.

Item R provides that costs which are not related to ICF/MR services are not allowable. This is a reasonable way to insure that ICF/MR rates only reflect ICF/MR services.

Item S disallows payment for an activity which is already compensated by gifts or grants from public funds. If such costs were allowed, it would result in duplicate payments by the taxpayers. A transfer of funds from a local government to its own facility is not considered to be a gift or grant and is, therefore, reasonably exempted from the disallowance.

Item T disallows telephone, television, and radio service in individual rooms because these costs are personal services which the resident may purchase, but whose provision is not necessary for the care of residents. The proposed rule parts allow the cost of telephones, television, and radio service in common areas to provide leisure time activities which encourage interaction among residents and to serve the need to communicate with persons outside the facility.

Item U disallows expenses related to agreements not to compete. Expenses related to noncompetitive agreements are not related to resident care and, therefore, it is reasonable to disallow such expenses.

Item V prevents vendors from being compensated twice through separate fees and through the payment rate. There is no question that ancillary services are related to resident care but this item only seeks to avoid duplicate billing.

Item W disallows uniform allowances unless required by government regulations. This is a reasonable way to insure that costs are related to resident care.

Item X which disallows costs for overnight trips, vacations or camping, is necessary to insure that quality care is provided in an economical and efficient manner and to insure that costs are related to resident care. An exception, however, is provided which allows a provider to use facility staff, equipment, supplies, and vehicles. In addition to these costs, a $300 limit per year per resident is allowed for other expenses. The $300 limit has a historical basis in previous rules (Rule 53 [Temporary]). It is reasonable to continue the limit given the legislative mandate for cost containment (Minnesota Statutes, section 256B.501, subd. 3).

Item Y which disallows payments for unsuccessful challenges to agency decisions is a reasonable way to maintain the standard that costs be related to resident care. To do otherwise would result in inefficient management of program monies. Minnesota Statutes, Section 256B.47, contains the same disallowance language for reimbursement to nursing homes under medical assistance. Administrative Law Judge Jon Lunde concluded the following after reviewing Minnesota Rules, parts 9549.0010 to 9549.0080.

"These costs have historically been disallowed by the Department and a determination of what constitutes an "unsuccessful challenge" has been successfully resolved on a case-by-case basis in negotiations with the nursing home claiming this kind of cost. Under Minnesota Statutes, section 256B.41, the commissioner is directed to adopt rules implementing nursing home rates. Generally speaking, where such a legislative mandate exists, any agency does not have the discretion to develop policy by ad hoc adjudication. See, e.g., Young Plumbing and Heating Co. v. Iowa, 276 N.W.2d 377 (Iowa; 1979). (Lunde Report, 1985: p. 36.) But, an agency may still proceed on a case-by-case basis where the formulation of specific rules is not feasible, where flexibility is needed and where the facts may vary considerably from case-to-case. Since challenges to the agency's decisions and policies usually involve varying degrees of success and varying types of relief, and since an ad hoc approach has been successfully used, it is concluded that further specificity, while advisable, is not essential." (Lunde Report, 1985: p. 36.) Both rules contain the same historical significance and language.

Item Z states that if salaries have been disallowed, then the benefits associated with such salary should also be disallowed since it is a part of such compensation. It would be unreasonable to hold the state responsible to pay for benefits related to compensation which has been disallowed.

Item AA which disallows costs for services provided under parts 9510.1020 to 9510.1140, is reasonable because a different payment mechanism is used to reimburse the associated expenses.

Item BB stipulates that if a facility has no obligation to make payments in lieu of real estate taxes, the Medical Assistance Program will not assume liability. The Medical Assistance Program is not a mechanism to provide special revenues to local governmental units.

Item CC which disallows costs related to influencing employees with respect to unionization is necessary due to the Tax, Equity, and Fiscal Responsibility Act of 1982, Public Law Number 97-248, Section 107.

Item DD disallows sales and reorganizations because they do not contribute to resident care. This item is necessary and reasonable due to the Deficit Reduction Act of 1984, Public Law 98-369, Sections 2314 (a) and (b) amending Sections 1861 (v)(1) and 1902 (a)(13) of the Social Security Act, 42 USC § 1395x (v)(1)(O); 42 USC § 1396a (a)(13)(B).

Item EE addresses the problem which could arise if a facility billed and received payment for compensation costs attributed to vacation and sick leave and did not then pay the employees for vacation and sick leave. The Department seeks to avoid this situation by requiring that such vacation and sick leave is vested.

Item FF disallows the costs of pension or profit sharing plans when the pension plan is not IRS approved or when benefits from both plans accrue to the same employee. It is reasonable not to allow both plans for the same employee as explained in 9553.0035, subp. 10.

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Item GG disallows costs for which adequate documentation is not maintained. It is necessary and reasonable to do this so that documentation is maintained pursuant to the terms of the rule and so that the burden of proof is not shifted from the provider to the department. Fairfax Hospital Association v. Califano, S85F2d.602, 611-612, (4th Cir. 1978). Without adequate documentation of costs, the Department could not fulfill its obligation to administer the expenditure of public funds. Thus, failure to support claims for reimbursement are an indicator that such claims are not generated by an efficiently, economically and prudently operated facility as required by state statute. (Minnesota Statutes, Section 256B.501.)

Part VII 9553.0040 REPORTING BY COST CATEGORY

Statement of Need:

Under Minnesota Statutes, section 256B.501, subdivision 2, the commissioner is authorized to "develop methods and standards" which are "adequate" to provide for the costs that must be incurred "...in efficiently and economically operated facilities." If the Department is to comply with the legislative mandate to pay for costs incurred by efficiently and economically operated facilities, it is necessary that financial information be obtained from the facilities. Further, it is necessary to establish a uniform method by which to record or itemize costs in order to facilitate the review and evaluation of financial reports, to enable the determination of allowable and nonallowable costs, and to establish and apply limits in a uniform manner among all providers.

Reasonableness:

It is reasonable to group related costs together and require their common reporting. The categories of program operating costs, maintenance operating costs, administrative operating costs, payroll taxes and employee benefits, and property related costs were designated because they fairly represent the types and categories of costs incurred by ICFs/MR.

It should also be noted that uniform classification according to part 9553.0040 will allow for comparison among facilities and thus enable the Department to set effective limits on expenditures. It is also important to uniformly classify costs according to these cost categories in order to insure that program related costs are kept separate from other costs and that expenditures in maintenance, administrative and property related cost categories are limited as required in Minnesota Statutes, section 256B.501, subdivision 3. This approach also will lay the groundwork for possible future implementation of a case mix outcome orientated reimbursement system which would be used to reimburse operating costs based on the care needs of residents and the achievement of program objectives by the provider's of MR services.

Part 9553.0040 Subpart 1. Program Operating Cost

Statement of Need:

It is necessary to group direct cost of program functions in the same category because these costs are those which have the greatest direct impact on resident care. Grouping of program costs together separates these costs from other cost categories which have more stringent incentives and limits.

Reasonableness:

It is reasonable to group the costs related to program functions together and to apply incentives and limits differently to this cost category because it is the policy of the state to emphasize the use of state resources for activities that directly benefit the care provided to residents.

Part 9553.0040 Subpart 2, Maintenance Operating Costs.

Statement of Need:

It is necessary to delineate those costs to be classified as maintenance costs so that providers will know which costs to include in this category.

Reasonableness:

The direct costs of dietary, laundry and linen, housekeeping, plant operations, and maintenance services are considered maintenance operating costs because they more closely relate to this category than to any of the other specified cost categories. Also, these costs do not logically fit into any of the other specified cost categories since they by their nature represent costs incurred in support of the program objectives.

Part 9553.0040 Subpart 3, Administrative Operating Costs.

Statement of Need:

It is necessary to delineate those items to be included in the administrative operating costs category so that providers will know which costs to include in this category and so that the limit on administrative costs can be uniformly applied among all providers.

Reasonableness:

Salaries and supportive services required for the management and administration of the facility have been included in the administrative cost category because this is consistent with the classification pattern of the previous ICF/MR reimbursement rules, 12 MCAR 2.05301 to 2.05315 [Temporary] and Rule 52 (Parts 9510.0500 to 9510.0890). The classification is also consistent with the nursing home reimbursement Rule 50 (9549.0010 to 9549.0080). Additionally, the legislature specifically mandates limits on these costs and therefore, it is reasonable to group these costs into a cost category. (Minnesota Statutes, section 256B.501, subdivision 3.)

Part 9553.0040 Subpart 4. Payroll Taxes and Employee Benefits.

Statement of Need:

Subpart 4 lists the items to be included within the payroll taxes and employee benefits category. This listing specifies what to include in this category for cost reporting purposes, so that the ICF/MR providers may avoid inappropriate classifications and so that those costs may be uniformly allocated to each cost category.

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Reasonableness:

Since the items included in this category are logically related, it is reasonable to group them together into a category. The commissioner shall allocate these costs to other cost categories in accordance with parts 9553.0030, subpart 6 for the purpose of establishing the limit on administrative costs.

Part 9553.0040 Subpart 5. Property Related Costs.

Statement of Need:

The property related payment rate is determined under a different method than that used for determining the operating costs payment rate and, therefore, property related costs must be reported separately.

Reasonableness:

The legislature specifically mandated that limits be placed on reimbursement for property (Minnesota Statutes, section 256B.501, subdivision 3). In order to implement this mandate property costs must be separated from other costs. Those costs included in the category of property costs are a continuation of the categorization made in the previous reimbursement rules.

Part VIII 9553.0041 General Reporting Requirements

Part 9553.0041 Subpart 1. Required Cost Reports.

Statement of Need:

It is necessary to clearly define reporting requirements to ensure fiscal accountability for the use of public funds and that providers and department staff clearly understand those requirements.

Reasonableness:

The federal government requires that the state "provide for the filing of uniform cost reports" and "provide for periodic audits of the financial and statistical records of participating providers." 42 CFR 447.253. Furthermore, Minnesota Statutes, section 256B.27, subdivision 1, authorizes the commissioner to require any reports, information, and audits of medical vendors which he deems necessary in the interest of the efficient administration of the Medical Assistance Program and incidental to the approval of rates and charges for the program. And, Minnesota Statutes, section 256B.501, subdivision 2, authorizes the commissioner to establish procedures for determining reimbursement rates.

The state has set a deadline of March 31 for submission of the cost report for the facility's reporting year ending December 31. The three month time period is a continuation of past practice in the previous reimbursement rule and in other department reimbursement rules (9549.0010 to 9549.0080) and provides an adequate period of time to complete audits and necessary cost report forms. The change to a common reporting year for all facilities proposed in these rule parts in reasonable and necessary in order to insure equitable treatment of facilities when indices and limits are applied. The common reporting year also improves the ability of the Department and the facilities to forecast budgets and take advantage of automated

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